such a statute as constitutional largely on the ground that it creates only a rule of evidence, not necessarily conclusive.[10]

Such diversity of construction leads to the suspicion that there is little real need for remedial statutes of this nature. Before the Federal Bankruptcy Act there was undoubtedly a serious evil. If an insolvent retail dealer could suddenly and secretly sell his stock in bulk, not only was it difficult for his creditors to find out what had been done with the proceeds, but the debtor could often make preferences which the remaining creditors were unable to defeat.[11] But the National Bankruptcy Act obviates both these dangers, by providing for a speedy discovery of assets [12] and by making a preference by an insolvent debtor an act of bankruptcy [13] and voidable.[14] Thus these statutes are of little use except in cases where the seller is solvent at the time of the sale, or where the purchaser acts *bona fide* and the seller absconds. The first application is hard on the seller. Among other results it leads to his being unable to recover the purchase price on a sale in violation of the statute until all his debts are paid.[15] The second application is in derogation of the ordinary law of fraudulent conveyances [16] and seems unduly hard on the purchaser. Of course, such burdens are largely relieved if the statute is taken merely as a rule of evidence.[17]

It seems doubtful, then, whether such an evil now exists as to render these statutes an expedient remedy. The real dangers for which such statutes might have been a wholesome remedy were largely removed by the Bankruptcy Act in 1898. The fact that the Bulk Sales Laws have all been enacted since 1898 makes it probable that their passage has been due rather to private enterprise [18] than to public need. The great majority of cases involve wholesale creditors and retail debtors, and it is obvious that these statutes give the former a great power over the latter. For the wholesaler can do much to prevent any sale of which he has notice. The statutes seem thus to furnish a surviving instance in which the law has favored the diligent creditor.[19]

POWERS OF NATIONAL BANKS TO ACQUIRE VARIOUS KINDS OF PROPERTY. — A recent case in Ohio, *Gress* v. *The Village of Fort Loramie*,[1] raises again the question of the kinds of property national banks may

[10] Goldstein *v.* Maloney, 62 Fla. 198, 57 So. 342 (1911); Sprintz *v.* Saxton, *supra.*

[11] See Lupton *v.* Cutter, 25 Mass. 298, 303 (1829). See also BUMP ON FRAUDULENT CONVEYANCES, 4 ed., 182.

[12] See NATIONAL BANKRUPTCY ACT, § 7, a, 1, and § 7, a, 8.

[13] *Id.*, § 3, a, 2.

[14] *Id.*, § 60, a, b.

[15] Seattle Brewing Co. *v.* Donofrio, 34 Wash. 18, 74 Pac. 823 (1904).

[16] See Cooney, Eckstein & Co. *v.* Sweat, 133 Ga. 511, 66 S. E. 257 (1909); Boise Ass'n of Credit Men *v.* Ellis, 26 Idaho, 438, 144 Pac. 6 (1914).

[17] See note 10, *supra.*

[18] See BULLETIN OF THE COMMERCIAL LAW LEAGUE OF AMERICA, Vol. VII, No. 2, p. 13; and Vol. XII, No. 2, p. 4.

[19] In Connecticut the statute is obviously aimed at preventing the small tradesman from selling his business. Strangely enough it was considered expedient to mention the proprietors of shoe-shine and dental parlors, and of hat-cleaning establishments, in express language. See CONN. STAT., REV. 1917, Chap. 204.

[1] 125 N. E. 112. See RECENT CASES, p. 726, *infra.*

acquire and the effect of such acquisition. The power to acquire real estate is strictly limited. National banks may not make present loans on the security of real estate mortgages,[2] although they are permitted to take mortgages in good faith as security for debts previously contracted, to accept conveyances in satisfaction of such debts, and to purchase real estate at sales under judgments, decrees, or mortgages held by them.[3] The National Banking Act permits a banking association organized under it to own such real estate "as shall be necessary for its immediate accommodation in the transaction of its business."[4] The words "immediate accommodation" would seem to limit the size of a building which a bank may erect to provide itself with banking quarters, but there is authority that it is not *ultra vires* for a bank to erect on its lot a building which is larger than the bank will ever require for its own purposes, on the ground that a bank, like any prudent owner of valuable land, may improve it in such a way as will render it most productive.[5] Since a national bank may invest its funds directly in real estate for banking quarters, it has been permitted to subscribe for stock in a corporation organized for the purpose of erecting an office building in which, by an agreement with the promoters, the bank was to take a lease of banking quarters.[6]

As regards the acquisition of stock, a somewhat greater latitude is allowed. Banks are prohibited from purchasing their own shares of stock, or making loans on the security of the same, although they may buy in such stock or take it as security in order to prevent a loss upon a debt previously contracted in good faith.[7] They have no power to purchase stock in other corporations as an investment, nor to deal in the same.[8] They do, however, possess the incidental power of accepting *bona fide* stock of other corporations as collateral security for present

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[2] Every national banking association is authorized "to exercise . . . all such incidental powers as shall be necessary to carry on the business of banking . . . by loaning money on personal security . . ." U. S. R. S., § 5136. Though this section does not in express terms prohibit the making of loans on the security of real estate, the implication to that effect is clear. But by the Federal Reserve Act of 1913, § 24, 38 STAT. L., Pt. I, 273, certain specified national banks are permitted, under limitations, to make loans secured by farm lands.

[3] See U. S. R. S., § 5137. Property so acquired must be disposed of within five years. *Ibid.*

[4] *Ibid.*

[5] See Brown *v.* Schleier, 118 Fed. 981 (1902). In this case the cost of the building exceeded the amount of the bank's capital stock. The larger part of the building was rented to tenants. The case was affirmed in 194 U. S. 18 (1904).

[6] Nat. Bank *v.* Stahlman, 132 Tenn. 367, 178 S. W. 942 (1915).

[7] See U. S. R. S., § 5201. Stock so acquired must be disposed of within six months from the date of its purchase. *Ibid.* By the Federal Reserve Act any bank becoming a member of a Federal Reserve Bank is required to conform to the provisions of law respecting the prohibition against making purchases of or loans on such stock. 38 STAT. L., Pt. I, 259.

[8] California Bank *v.* Kennedy, 167 U. S. 362 (1897); Nat. Bank *v.* Hawkins, 174 U. S. 364 (1899); Barron *v.* McKinnon, 196 Fed. 933 (1912). See Nat. Bank *v.* Nat. Exch. Bank, 92 U. S. 122 (1875). In California Bank *v.* Kennedy the court said: "It is settled that the United States statutes relative to national banks constitute the measure of the authority of such corporations, and that they cannot rightfully exercise any powers except those expressly granted, or which are incidental to carrying on the business for which they are established. . . . It is clear, however, that a national bank does not possess the power to deal in stocks. The prohibition is implied from the failure to grant the power."

loans, or for a previous indebtedness.[9] In the enforcement of their lien they may purchase such stock,[10] or may accept it in absolute satisfaction of a doubtful debt, with a view to its subsequent sale or conversion into money, in order to prevent or reduce an anticipated loss.[11] Loans made on the security of stock of other national banks are permissible.[12] Not only are national banks allowed to accept stock of other corporations in payment of debts which are due to them, but it has even been held that they may in a *bona fide* compromise of a claim which *they owe* acquire such stock as part of the settlement.[13]

The courts are opposed to allowing national banks to acquire property which will subject them to any great or uncertain liability. Consequently, they cannot under any circumstances become the absolute owner of certificates representing an interest in a partnership, by which they will incur the partner's risk of unlimited liability.[14] It is beyond their power to engage in the business of operating a mill which has been acquired in satisfaction of a debt,[15] or to prosecute a mining en-

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[9] See California Bank *v.* Kennedy, *supra.*

[10] Westminster Nat. Bank *v.* N. E. Electrical Works, 73 N. H. 465, 62 Atl. 971 (1906); McBoyle *v.* Nat. Bank, 162 Cal. 277, 122 Pac. 458 (1912).

[11] Tourtelot *v.* Whithed, 9 N. D. 467, 84 N. W. 8 (1900). See Nat. Bank *v.* Nat. Exch. Bank, *supra.* But *cf.* Nat. Bank *v.* Converse, 200 U. S. 425 (1906). In this last case the creditors, one of whom was a national bank, of an insolvent corporation organized a new corporation to purchase the capital stock, debts, and assets of the insolvent company, and to manufacture the articles which the insolvent had made. The creditors exchanged their claims against the old corporation for stock in the new one. The new company carried on business for more than sixteen years and then in turn became insolvent. The receiver sued the bank to recover an assessment levied on the stock of the new corporation, which by statute was subject to a double liability. The court refused recovery on the ground that the action of the bank in taking the stock was *ultra vires.* A national bank, it held, has no power, expressed or implied, to engage in or promote a purely speculative business or adventure, or to take stock in a corporation for that purpose.

[12] Nat. Bank *v.* Case, 99 U. S. 628 (1878). On default in the payment of the loan the pledgee bank became the owner of the stock, and upon the failure of the bank whose stock was held, became liable as a stockholder. See Nat. Bank *v.* Hawkins, *supra.*

[13] Nat. Bank *v.* Nat. Exch. Bank, *supra.* In this case the debtor bank could have compromised the debt by a payment of $20,000. Instead it paid $40,000, and received from the creditor in addition to the cancellation of the claim fourteen hundred shares of stock in other corporations. The reasoning of the court was that, since a bank may accept stock of other corporations in payment of debts due to it, conversely, if the bank is itself a debtor, it may invest fresh funds in the purchase of stocks, provided their acquisition is part of the transaction by which the claim was paid. The later case of Nat. Bank *v.* Converse, *supra,* seemingly holds national banks to a much stricter rule, and though the two cases are distinguishable on their facts and may both be followed on the exact points decided, they seem on principle to be difficult to reconcile.

[14] Merchants' Nat. Bank *v.* Wehrmann, 202 U. S. 295 (1906). The certificates were originally taken as security for a loan, and the bank became the owner of them in satisfaction of the debt. The court distinguished this case from Bank *v.* Case, *supra.* In the latter case the debts of the corporation were not the debts of the stockholders, and though the stock was subject to an added liability, this did not amount to more than the par value of the shares. In the former case the liability was unlimited, for the debts of the partnership were the debts of the partners.

[15] Cockrill *v.* Abeles, 86 Fed. 505 (1898): "The most liberal view which may be fairly taken of the implied powers of national banks would not sustain their right to engage directly in a manufacturing or business enterprise under any circumstances." But in Peterborough Hydraulic Power *v.* McAllister, 17 Ont. L. Rep. 145 (1907), the

terprise on property similarly acquired.[16] They are not estopped to plead their lack of power in order to escape liability on their *ultra vires* contracts.[17] Though the courts will refuse on grounds of public policy to enforce such contracts, the bank will not be permitted to retain any benefit which it may have received under the contract. The other party will be allowed on principles of *quasi*-contract to recover the property or its value upon a repudiation of the contract.[18] In The Village of Fort Loramie[19] case referred to above, a national bank bought in a street railway at a receiver's sale in order to protect the bonds of the company which it owned. The village tried to compel the bank to continue the operation of the road according to the terms of the franchise, and the bank set up its lack of power to assume such an obligation. The court properly held that the bank could not be compelled to perform its illegal contract, and allowed it thereby to escape the duty which it owed to the public as owner[20] of the franchise to operate the road.[21] But instead of permitting the bank to dismantle the road unless a tender was made to it within a limited time of the amount which it paid for the property, the court should, it is submitted, have compelled the bank to put the road up at public auction and accept whatever price it might bring. In this way a purchaser might have been found who would have been willing to operate the road and perform the obligations of the franchise.

PRIVILEGE OF NON-RESIDENTS ENGAGED IN PUBLIC DUTY FROM SERVICE OF PROCESS. — If a person is within the territory [1] of a sovereign,

court held that a bank could carry on a milling business which had been acquired in satisfaction of a bad debt, for the purpose of disposing of it as a going concern. And in Reynolds *v.* Simpson, 74 Ga. 454 (1885), it was held that a state bank was not exceeding its corporate powers by running an iron works similarly acquired, in order to satisfy the debt it held against the former owner. A National Bank may buy wheat in order to seed a farm which it has been compelled to purchase under an execution in its own favor. Nat. Bank *v.* Bannister, 7 Kan. App. 787, 54 Pac. 20 (1898).

[16] Cooper *v.* Hill, 94 Fed. 582 (1899).

[17] California Bank *v.* Kennedy, *supra;* Nat. Bank *v.* Hawkins, *supra;* Nat. Bank *v.* Converse, *supra;* Nat. Bank *v.* Wehrmann, *supra.* The reasons why the courts refuse to apply the doctrine of estoppel in these cases of *ultra vires* acts of corporations are stated in McCormick *v.* Bank, 165 U. S. 538, 549 (1897): "The obligation of any one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subject to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law."

[18] Nat. Bank *v.* Townsend, 139 U. S. 67 (1891); Pullman's Palace Car Co. *v.* Central Transportation Co., 171 U. S. 138, 151 (1898); Appleton *v.* Nat. Bank, 190 N. Y. 417, 83 N. E. 470 (1908); Barron *v.* McKinnon, 196 Fed. 933, 938 (1912).

[19] See *supra*, note 1.

[20] Title to the property passes to the vendee bank under an executed *ultra vires* contract. Barron *v.* McKinnon, *supra.* Neither the grantor nor third persons can avoid the conveyance on the ground that the grantee has exceeded its powers. The disregard of the Act of Congress only lays the bank open to proceedings by the government for exercising powers not conferred by law. Kerfoot *v.* Farmers' & Merchants' Bank, 218 U. S. 281 (1910).

[21] On the right of a public utility to cease operation and dismantle its plant, see 32 HARV. L. REV. 716.

[1] For the basis of jurisdiction in European countries see Joseph H. Beale, Jr., "Jurisdiction of the Courts over Foreigners," 26 HARV. L. REV. 193.